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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1147

THE FIRESTONE TIRE & RUBBER COMPANY,
Petitioner,

v.

S. MARTIN TAYLOR, DIRECTOR, THE MICHIGAN EMPLOYMENT SECURITY COMMISSION, THE MICHIGAN EMPLOYMENT SECURITY COMMISSION, FRANK PADZIESKI, WALTER CAMPBELL, RAYMOND M. LYONS, AND ALEX FULLER, MEMBERS OF THE MICHIGAN EMPLOYMENT SECURITY COMMISSION, INTERNATIONAL UNION, UNITED AUTOMOBILE AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA,
Respondents.

REPLY OF PETITIONER TO BRIEFS IN OPPOSITION TO PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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The Briefs of the Respondents, Michigan Employment Security Commission (the "State") and International Union, UAW ("UAW"), confirm the importance of this Court's consideration of the issues raised by the Petition. The concessions of the State and the UAW, moreover, establish that if this Court does not grant the Petition, it should summarily reverse the judgment below.

I. THE ARGUMENTS OF THE RESPONDENTS DEMONSTRATE THE CRITICAL ISSUES WHICH REQUIRE THIS COURT'S CONSIDERATION.

The discussion by the State and the UAW of the Title VII and *Nash* issues raised at pages 12-20 of the Petition demonstrate clearly and convincingly both the importance of those issues and the need for this Court to resolve them.

The UAW and the State argue that mandatory pregnancy leave violates Title VII (State Brief, pp. 17-19; UAW Brief, pp. 25-26), but in doing so only demonstrate the extent to which there appears to be uncertainty about this Court's decisions. Petitioner believes these decisions establish that Title VII does not preclude mandatory pregnancy leave, see Petition, pp. 16-18. Respondents, however, assert that Title VII does prohibit such leave. The UAW assumes that the decision below does not conflict with *Gilbert* and *Satty*, as demonstrated in the Petition, but that is in fact one of the important issues posed by this case.[1]

With respect to the *Nash* issue, Petitioner respectfully requests the Court to read the State's analysis of that issue at pages 14-16, 20-21 of its Brief concurrently with the Petition's consideration of *Nash* at pages 18-20. A reading of these two discussions of *Nash* is itself an eloquent demonstration of the need for this Court to address the *Nash* issue raised by this case.

The State asserts that the denial of unemployment compensation is "punishment for activity which an act of Congress protects against discrimination." (State Brief page 20). What activity? What act of Congress? And what

[1]The MESC suggests that *Aiello*, cited by Petitioner, is "irrelevant to this case." State Brief, p. 19. But, as noted in the Petition, this Court placed considerable reliance on that case in its *Gilbert* opinion.

punishment? MESA Section 48 provides that no unemployment compensation will be paid to any of a broad class of persons on leave and never mentions the term "pregnancy" or "woman." There is no indication (or allegation) that the Michigan legislature enacted MESA Section 48 in order to punish women for becoming pregnant.

The State asserts that the denial of unemployment compensation "encouraged" employers to provide pregnancy leaves. But there has been no trial to assess the validity of that allegation. In any event, as the UAW recognizes, Petitioner eliminated its mandatory leave policy when the EEOC (erroneously) declared that pregnancy leave violated Title VII, even though Michigan at that time was not paying unemployment compensation to the pregnant women placed on leave. This demonstrated (as is in any event self-evident) that employers would be deterred more by the possibility of backpay actions (if pregnancy leaves were unlawful) than they would be encouraged to place women on leave by the fact that the state would not pay unemployment compensation.

If, as the State asserts, the Courts below applied *Nash* in these circumstances, they extended it improperly far. This Court should consider the issue raised by such an extension: whether, *if* mandatory pregnancy leave violates federal law, the State is preempted from applying to pregnant women a sexually neutral provision that unemployment compensation funds be spent for people who are only temporarily on leave and can go back to work when their leave has ended.

II. THE ASSERTIONS OF THE RESPONDENTS MAKE CLEAR THE NEED FOR SUMMARY REVERSAL OF THE DECISION BELOW.

The Petition established that the proceedings below, for a number of reasons, departed so far from the accepted course of judicial proceedings and so violated Petitioner's Constitutional rights that this Court should grant the Petition and summarily reverse the decision below. (Petition, pp. 22-25) Now, the State and UAW have made assertions that establish clearly that the Consent Order in *UAW v. Taylor* was based upon Constitutional grounds and thus beyond the jurisdiction of the single judge who entered it. These assertions demonstrate even further the need for summary reversal.

It has never been possible for Petitioner to pin the other parties (or the District Court) down as to just what principle of "Federal law" MESA Section 48 was supposed to have violated or contravened.[2] In denying Petitioner's Motion to Intervene in *UAW v. Taylor*, the District Court cited only

[2]Both the UAW and the State defend the decision below by citing whatever Federal law seems to suit their purpose at the moment. When they are trying to defuse Petitioner's Title VII arguments, they cite this Court's Constitutional decisions in *Turner* and *LaFleur*. At other times they seem to find it expedient to argue that Title VII was the *ratio decidendi* of the Consent Order. See, *e.g.*, UAW Brief, p. 33, the second paragraph, footnote 44.

Furthermore, when the UAW considers the possible non-constitutional basis of the Consent Order, it cannot decide whether or not the Consent Order was based upon the application of the *Nash* doctrine. Compare UAW Brief, p. 27, saying this was not a *Nash* case, with the UAW Brief, p. 21, citing *Nash* and asserting the decisional basis was that the State "impeded certain Federal laws." Only this balancing act permits the UAW to say that the Consent Order is not contrary to *Vick v. Texas Employment Commission*, 514 F.2d 734, *reh. denied*, 520 F.2d 944 (5th Cir. 1975), because based on *Nash*, and also that the Consent Order is not an extension of *Nash* because, says the UAW, it is *not* based on *Nash*. Compare UAW Brief, p. 23 and p. 27.

one authority on the merits of the Consent Order: this Court's Constitutional decision in *Turner v. Department of Employment Security of Utah*, 423 U.S. 44 (1975). The District Court held that in light of *Turner* ". . . the Court is convinced of its correctness of its prior orders in this case."

Because *Turner* was a Constitutional decision and because the Consent Order in *UAW v. Taylor* was entered by a single judge and not by a three-judge court, as then required for Constitutional injunctions against the enforcement of state statutes, Petitioner complained in *Firestone v. Taylor* that the Consent Order was beyond the jurisdiction and the power of a single judge and accordingly void. See 28 U.S.C. §2281 (1970 ed.).

The Sixth Circuit, however, held that the District Court had not based the Consent Order upon the Constitution, but upon Title VII. (See Appendix to Petition, p. 5a). And the Petition, taking that as the operative statement of the legal issues in this case, urged that the application of Title VII here raised a number of important issues that require this Court's consideration.

But now the UAW and the State contend that it was Constitutional questions that were critical to the entering of the Consent Order. Each agrees that the Consent Order was, in the words of the UAW, "a direct result of this Court's decision in *Cleveland Board of Educ. v. LaFleur*, 414 U.S. 632 (1974)," (UAW Brief, p. 16; see also State Brief, p. 4). *LaFleur* was a purely Constitutional decision. In addition, both the State and the UAW argue that *Turner* is dispositive and that for this reason this Court should deny the Petition. Indeed, the UAW goes so far as to assert that "Firestone's post-*Turner* tenacity is not admirable." See UAW Brief, pp. 21-22, including n. 24; State Brief p. 12. *Turner* was also a purely Constitutional decision.

Thus, the assertions of the parties to the Consent Order now inform us that the elusive "Federal law" which was the

basis of the Consent Order was the Constitution. If that is so, the decision below is clearly wrong in that it upholds a single judge's injunction against the enforcement of a state statute for Constitutional (Fourteenth Amendment) reasons.[3]

Even if this Court were not to grant the Petition for the purpose of considering the issues raised therein, it should grant the Petition and summarily reverse the decision below as beyond the jurisdiction of the courts below and otherwise totally erroneous (as described in the Petition). At a minimum, the action should be remanded to the Sixth Circuit for a complete and appropriate determination of the *ratio decidendi* of the Consent Order.

III. THE UAW BRIEF IS EXTRANEOUS AND MISLEADING.

Virtually all the UAW Brief is extraneous and misleading. It is also verbose and disjointed. As such, it would properly be subject to a motion to strike. Petitioner, however, will not ask this Court to take the time to consider such a motion.

The bulk of the UAW Brief consists of extraneous factual assertions and legal argument concerning an issue not before this Court: namely, whether Petitioner's Motion to Intervene in *UAW v. Taylor* was properly denied under Fed. R. Civ. Pro. 24. While Petitioner believes that the Courts below erred in denying intervention, Petitioner has not asked this Court to consider the intervention issue, and

[3]As Petitioner argued to the Courts below, there is no valid Constitutional basis for the Consent Order. See, *e.g.*, *Geduldig v. Aiello*, 417 U.S. 484 (1974). Since any Constitutional basis for the Consent Order renders it void on jurisdictional grounds, this Court could not reach the Constitutional issues in the present posture of these proceedings; and, Petitioner accordingly does not here address them.

the UAW's extensive factual and legal assertions directed at that question are simply beside the point.[4]

The frequent assertions in the UAW's Brief that Petitioner (and by inference, its counsel) are guilty of making false and misleading statements to this Court are untrue and do not belong in a submission made to this Court. We do not wish to burden the Court with a point-by-point refutation. But to indicate the tenor of the UAW's false accusations and to clarify the Record on points which relate to the issues raised by the Petition a few examples of the false accusations will suffice.

The UAW accuses the Petitioner of misleading this Court by stating that the State's counsel conceded that it did not represent employers' interest in *UAW v. Taylor*. (UAW Brief, p. 14) But the statements made to the District Court by the State's counsel, as quoted by the UAW itself and by the State, quite clearly show that the MESC's counsel was not in fact representing employers in the suit.[5]

The UAW accuses Petitioner of being "MISLEADING" in stating that the Consent Order was totally silent with

[4]Further, both the UAW and the State assert that Petitioner is bound by *res judicata* or collateral estoppel because it was a party to a state court case in which the state court held that it was bound by the Federal Court's determination of Federal law in the *UAW v. Taylor* Consent Order. This is a bizarre argument. The state court decision was entered on August 30, 1974, after the Consent Order in *UAW v. Taylor* was entered. As the UAW itself concedes (Brief, p. 18), the state court order "was expressly based upon" the Consent Order. The Federal law issues were not litigated in the state case — how could the state court have "reversed" a Federal Court's determination of Federal law? There can clearly be no *res judicata* or collateral estoppel.

[5]The State's view of its role is demonstrated by its Brief here. That Brief seems intent on attacking the State legislation and the acts of the State agency. It is at times difficult to remember that this is a brief filed on behalf of the State. It is obvious that no party in this case has defended the legality of the statute at issue or opposed the legality of the judgment sought by the claimants.

respect to what Federal law it was decided under. (UAW Brief, p. 6) But that is a fact. Indeed it is confirmed by the UAW's recitation that the Consent Order was "based upon" the Complaint and Motion for Summary Judgment (one assumes Orders are based on laws, not pleadings) and that the Complaint "set forth several Federal laws which were impeded or violated. . . ." Unless Petitioner's counsel are deaf, the Consent Order remains silent as to what Federal law it was based on — a silence that is not cured by the noise of the claimant's pleadings or Respondents' Briefs here.

At page 5 of its Brief, the UAW asserts that the plaintiffs in *UAW v. Taylor* complained only of a state "practice, set forth in an informal, internal MESC manual and not even promulgated in any formal MESC regulation." To the contrary, what was at issue in *UAW v. Taylor* was not some informal internal administrative interpretation: the Consent Order enjoined the application of the precise words of a duly enacted state statute.

Yet another example of the UAW's misleading statements is the UAW's assertions that the MESC "voluntarily" ceased applying MESA Section 48 to women on pregnancy leave. (UAW Brief, pp. 20, 24) The Record is clear that the MESC took this action only after it had agreed to the *UAW v. Taylor* Consent Order, albeit before that Order was formally entered by the Court. The State's actions are pursuant to that Order. Why else was it entered? Moreover, if the State were acting "voluntarily," then the judgments below were beyond the jurisdiction of the courts (since there was no case or controversy) and the judgment below should be summarily reversed.

CONCLUSION

For the reasons stated in the Petition and in this Reply, the Petition for a Writ of Certiorari should be granted, or the judgment below, on Respondents' own arguments, should be summarily reversed.

Respectfully submitted,

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